Perwira Affin Bank Bhd v Shaharuddin bin Adnan

HIGH COURT (KUALA LUMPUR) — SUMMONS NO S2 (S1)–24–186 OF 1998
KAMALANATHAN RATNAM J
10 OCTOBER 200

Civil Procedure *— Time — Extension of — Application to extend originating summons after expiry of first extension — Whether application should be allowed*

The plaintiff filed foreclosure proceedings against the defendant. The originating summons ('the OS') expired as nothing was done to effect service for one year. An extension of one year from the date of expiry of the OS was granted. After the extension granted in the earlier application had lapsed, the plaintiff filed an ex parte application for leave to extend the life of the OS for another year.

Held, dismisssing the application:

The plaintiff had sat on the matter for another year and let the OS expire. If the defendant had failed to settle the sum after the first application, it was the duty of the plaintiff to have proceeded with alacrity. The plaintiff had also failed to give explanation for its weird conduct in filing a 'Saman Pemula Serentak'. The entire proceedings was a non-starter (see p 192E-G).

[**Bahasa Malaysia summary**

Plaintif telah memfailkan tindakan melelong terhadap defendan. Saman pemula ('SP tersebut') telah luput kerana tidak ada apa-apa tindakan yang diambil untuk mengefeksikan penyampaian dalam masa setahun. Lanjutan masa satu tahun dari tarikh luput SP tersebut telah dibenarkan. Setelah lanjutan masa dalam permohonan awal tersebut telah luput, plaintif memfail satu permohonan ex parte untuk mendapatkan kebenaran melanjutkan hayat SP tersebut untuk satu tahun lagi.

Diputuskan, menolak permohonan tersebut:

Plaintif telah mengabaikan perkara tersebut bagi satu tahun lagi dan membiarkan SP tersebut luput. Sekiranya defendan gagal menjelaskan hutang tersebut selepas permohonan pertama dibuat, adalah menjadi tanggungjawab plaintif meneruskan tindakannya dengan segera. Plaintif juga gagal memberi penjelasan bagi tindakannya yang janggal dalam memfailkan satu 'Saman Pemula Serentak'. Seluruh tindakan tersebut langsung tidak mempunyai apa-apa makna (lihat ms 192E–G).

Notes

For cases on extension of time generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4857–4877.

Adrian Hii (*Shook Lin & Bok*) for the plaintiff.

Kamalanathan Ratnam J. :

Facts

On 3 March 1998, the plaintiff filed these foreclosure proceedings (encl 1) against the defendant. At the same time the plaintiff also filed an affidavit in support. It must also be pointed out that in the originating summons ('the OS') the plaintiff gave two addresses of the defendant, one at 105, Jalan Raja Abdullah, Kampung Baru, Kuala Lumpur, and the other at No 3, Jalan Hamzah, Kampung Baru, Kuala Lumpur. Nothing was done to effect service for one year. The OS expired on 2 March 1999. After the expiry of the said OS, the plaintiff filed on 30 March 1999 an ex parte application for leave to extend the life of the OS for one year from the date of expiry, that is, 2 March 1999. The reasons given in the said application were as follows:

(1) The defendant had made overtures towards settlement of the amount owing and hence the plaintiff had not effected service.

(2) As the debtor failed to settle the debt, the plaintiff tried to effect service upon the defendant without success.

(3) The plaintiff prayed for an order to extend the OS to enable the plaintiff to effect service.

The said application was fixed for hearing before the learned senior assistant registrar ('SAR') on 26 April 1999, and the plaintiff obtained the said order. The plaintiff's solicitors then wrote to the registrar on 29 June 1999 contending that the said fair order had not been released to them as yet. I have perused the entire court file and I note that since then neither the plaintiff nor its solicitors did anything.

Since all foreclosure proceedings have now been fixed before this court (Civil Court 2), the plaintiff's solicitors were informed by the registrar of the Civil Court 1 by a letter dated 1 November 1999 that this case has since been transferred to Civil Court 2. It would seem that even this extended period had expired on 2 March 2000.

On 6 March 2000, the plaintiff filed yet again another application (encl 7) to extend the life of the OS by another year from the date of expiry, that is, 2 March 2000. The grounds stated in this application for leave to extend were as follows:

(1) Sometime in July 1999, the plaintiff's debtor made an offer to settle the debt and because of that the OS was unserved.

(2) The defendant had failed to settle the debt and because of that the plaintiff was applying to extend the life of the OS to enable the plaintiff to effect service.

The said application was heard by the learned SAR on 11 April 2000 and an order in terms of the application was granted. Without even attempting to pursue the order obtained on 11 April 2000 the plaintiff filed, on 25 May 2000, what is called a 'saman pemula serentak' (encl 9) which is a repetition of encl 1. By a letter dated 14 August 2000 the registry informed the plaintiff's solicitors that encl 1 was fixed for hearing before the judge on 22 August 2000.

On 22 August 2000, Mr Adrian Hii, who all the while has had the conduct of this matter since he was the counsel who had affirmed the affidavits in support of both the applications to extend the life of the OS, appeared before me and sought leave to withdraw the OS with liberty to refile. Whilst not specifically granting liberty to refile, I made an order striking off the OS. The plaintiff has appealed against my decision in not granting liberty to refile.

Findings of the court

Having read the file before the hearing, I had noted all the misgivings of the plaintiff and its solicitors throughout the conduct of these proceedings. Counsel let one year go by before making the first application to extend. However, the application was made after the OS had expired. Whilst not making any order in respect of the learned SAR's order giving leave to extend, I questioned in my mind the propriety of extending a dead OS. Even then the plaintiff did nothing. The plaintiff sat on this matter for another year and let the OS expire. The plaintiff then made a second application, also after the OS had expired. The reasons given were almost identical to those stated in the earlier application. Surely if the defendant had failed to settle the sum after the first application, it was the duty of the plaintiff to have proceeded with alacrity. However, the plaintiff dragged its feet. Having obtained the second extension which meant that the OS has now been kept alive from 2 March 2000 to 1 March 2001, the plaintiff gave no explanation for its weird conduct in filing a 'Saman Pemula Serentak' on 25 May 2000. The plaintiff has not even explained under what provision of the law it had filed such an application.

To my mind, the entire proceedings was a non-starter. The plaintiff ought to have gracefully withdrawn this application from the outset and refiled instead of plunging deeper and deeper into a quagmire. It is my judgment that allowing the plaintiff the right to withdraw with liberty would mean that this Court is again condoning the lackadaisical attitude of the plaintiff and its counsel and depriving the defendant of the right to take any or all of the challenges that I have enumerated. An order of this court granting leave to withdraw with liberty would give an unfair advantage to the plaintiff because the defendant would have to apply to set aside that order if he intends to appear in, and/or to challenge the proceedings. Besides, granting leave to withdraw with liberty is an exercise of the judge's discretion. The conduct of the plaintiff in this case does not warrant the exercise of discretion to grant leave to withdraw with liberty. I have struck the OS off. The plaintiff needless to say may refile but at least the defendant

will know that this court had refused to exercise its discretion on the evidence available.

Application dismissed.

Reported by Wong Ee Lynn